No. 3961 No. 3978

In The United States Circuit Court of Appeals

For The Ninth Circuit

In the Matter of
PATTERSON - MACDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt.

COMMONWEALTH OF AUSTRALIA, *Petitioner*,

vs.

A. M. MACDONALD and JOHN L. MCLEAN, as trustee in Bankruptcy of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt, *Respondents.*

COMMONWEALTH OF AUSTRALIA and MARK SHELDON, as Commissioner for the Commonwealth of Australia, *Appellants*,

vs.

A. M. MACDONALD and JOHN L. MCLEAN, as trustee in Bankruptcy of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt, *Appellees.*

BRIEF OF RESPONDENTS AND APPELLEES

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Brief of Respondents and Appellees

MOTION TO DISMISS APPEAL

The same question presented by the petition to revise is also brought up by an appeal, and it has been stipulated that both proceedings may be con-

sidered and disposed of together. The appellees now move that this appeal be dismissed, for the reason that this court is without jurisdiction to entertain the same, and appellant is in default under Rule twenty-four of this court.

ARGUMENT UPON MOTION TO DISMISS APPEAL

The order appealed from confirms an order of the referee making an allowance to A. M. MacDonald for services rendered and expenses incurred by him at the request of the trustee in connection with the administration of the estate and for its benefit. Such an order relates solely to a proceeding in bankruptcy of an administrative character and is not appealable under any of the provisions of the Bankruptcy Act. It does not constitute the allowance or rejection of a claim under Section 25-a (3).

W. J. Davidson & Co. v. Friedman, 140 Fed. 853, (C. C. A. 6th Cir.)

Ohio Valley Bank Co. v. Switzer, 153 Fed. 362, (C. C. A. 6th Cir.)

The order is subject to review in matter of law only under Section 24-b, and this remedy excludes jurisdiction of an appeal.

W. J. Davidson & Co. v. Friedman, supra.

Ohio Valley Bank Co. v. Switzer, supra.

Kinkead v. J. Bacon & Son, 230 Fed. 362, (C. C. A. 6th Cir.)

Petition of Baxter, 269 Fed. 344, (C. C. A. 6th Cir.)

Yaryan Rosin & Turpentine Co. v. Isaac, 270 Fed. 710, (C. C. A. 5th Cir.)

See also:

In re Loving, 224 U. S. 183, 56 L. Ed. 725.

In re Creech Bros. Lbr. Co., 240 Fed. 8, (C. C. A. 9th Cir.)

Morehouse v. Pacific Hardware & Steel Co., 177 Fed. 337, (C. C. A. 9th Cir.)

In re Mueller, 135 Fed. 711, (C. C. A. 6th Cir.)

Kirsner v. Taliaferro, 202 Fed. 51, (C. C. A. 4th Cir.)

Furthermore, the appellant has failed to file any brief in support of its appeal, as required by Rule twenty-four.

MOTION TO DISMISS PETITION FOR REVIEW

Respondents move that the petition for review be dismissed, because petitioner is not entitled to maintain the same.

ARGUMENT UPON MOTION TO DISMISS PETITION FOR REVIEW

(a) When the petitioner's claim was originally presented to the referee in the bankruptcy proceedings, it was objected to by the trustee on various grounds, one being that the claim was unliqui-

dated. This ground of objection was confessed, and liquidation proceedings were instituted upon application to and direction of the district judge, who referred the matter to a special master. These liquidation proceedings have resulted in a finding and report by the special master, that petitioner has no claim, and that instead of the bankrupt being indebted to the claimant, it has overpaid the claimant $312,602.48. The master's report has been confirmed by the district court, and an appeal from this decision has been taken. The determination of whether the petitioner is a creditor of the bankrupt involves questions of fact which cannot be considered in this proceeding. (See cases cited below, pages 7-8). Upon the record as it stands in this case, the petitioner is not a creditor, and is therefore not a party aggrieved who is entitled to bring a petition under Section 24-b of the Bankruptcy Act. (See respondents' answer, paragraph I).

(b) Even if petitioner be recognized as a party aggrieved, it cannot maintain this proceeding unless it shows that it has made a demand upon the trustee to review the order and he has refused to do so, and it has then upon motion been granted permission by the court to proceed in its own name.

In re Mexico Hardware Co., 197 Fed. 650, (D. C. New Mexico).

Shatfield et al. vs. O'Dwyer, 101 Fed. 797, (C. C. A. 8th Cir.)

In this case, no request was made upon the

trustee to act, nor any permission secured by the petitioner, granting it leave to bring these proceedings in its own name. The petitioner, forseeing this objection, has endeavored to meet it by the allegations of paragraph twelve of its petition, but these allegations, even if true, are insufficient to excuse its failure to follow the proper procedure.

In re Mexico Hardware Co., supra.

The reasons for the application of this rule are particularly strong in the present case, where petitioner has been twice determined to be not a creditor but a debtor of the estate. It has held up this order since the 23rd of August, 1922, and if it is entitled to maintain this proceeding, it can likewise interfere in its own name with every administrative step in the bankruptcy proceedings. To permit it to do this would be contrary to the salutary principles announced in the above cases.

ARGUMENT UPON PETITION FOR REVIEW.

Since Section 24-b of the Bankruptcy Act does not contemplate any review of the facts by this court, any questions presented upon this petition which involve or depend upon consideration and decision of disputed facts, cannot be entertained.

Whitla & Nelson v. Boyd, 213 Fed. 587, (C. C. A. 9th Cir.)

In re Henry Siegel Co., 216 Fed. 943 (p. 946) (D. C. Mass).

Chatfield et al. vs. O'Dwyer, 101 Fed. 797, (C. C. A. 9th Cir.)

Gaudette v. Graham, 164 Fed. 311, (C. C. A. 9th Cir.)

Kenova Loan & Trust Co., v. Graham, 135 Fed. 717, (C. C. A. 4th Cir.)

In re Ann Arbor Machine Corp., 274 Fed. 24, (C. C. A. 6th Cir.)

It therefore becomes material to determine at the outset to what extent the specifications of error submitted in petitioner's brief involve questions of fact. We shall take them up in irregular order.

The fifth specification urging that the allowance is excessive, may be entirely disregarded, as it presents a pure question of fact.

Whitla & Nelson v. Boyd, 213 Fed. 587, (C. C. A. 9th Cir.)

Yaryan Rosin & Turpentine Co. v. Isaac, 270 Fed. 710, (C. C. A. 5th Cir.)

The second specification (Pet. Br. p. 6), raises the question of authority given to the trustee by the referee and the creditors to employ A. M. MacDonald. The objection made before the referee at the time of the allowance, (Record, p. 7, par. IV) was that MacDonald was not, in fact, employed to render any service, but no claim was made that the trustee was not authorized to employ him. This objection as then made, that MacDonald was not employed by the trustee to render the services in question, was not thereafter urged, but on its petition for review by the District Judge, and in its Assignments

of Errors in this proceeding (Record, pp. 22 and 12), the petitioner adopted the language of its second specification raising the question of whether the trustee was authorized to employ him. The referee certifies that the services rendered by MacDonald were at the request of the trustee and with the knowledge and consent of the creditors, and that at all times during the prosecution of the claim with which he was assisting, it was represented to the referee and the creditors by the trustee and his counsel that such services were absolutely essential. (Record, p. 16). He also states that the creditors and this petitioner were at all times kept fully advised of the rendering of such services and the apparent necessity therefor, and that the creditors and this petitioner from time to time consented at creditors' meetings, to payments being made to MacDonald to apply on account of such services. It appears that this matter must have come before the creditors at various meetings during the years 1921 and 1922, as orders making allowances to MacDonald on account of compensation for services, prior to the present order complained of, were made on February 16th, 1921, June 1st, 1921 and October 7th, 1921. (See respondent's answer, paragraph II; record on appeal pp. 4-9). This second specification of error, therefore, raises a question upon which the facts, as certified to by the referee, are at variance with petitioner's contention, and upon which the entire proceedings, oc-

curring at numerous creditors' meetings at which MacDonald's employment was considered, are not presented to this court. The extent to which the trustee was authorized to agree with Mr. MacDonald to pay him compensation for his services is fundamentally a question of fact.

Furthermore, this issue raised by this specification is immaterial because the allowance was not predicated on any contract of employment by the trustee, fixing the amount of compensation to be paid, but was made in consideration of the beneficial services rendered the estate. Any defect in previous authority to the trustee to employ him was cured by the ratification of the referee and creditors in making the allowance.

In addition to all this, since this objection was not taken before the referee at the time the allowance was made, it will not be looked upon with favor by this court.

In re Rome, 162 Fed. 971 (D. C. N. J.).

Household Supply Co. v. Whiteaker, 236 Fed. 730, (C. C. A. 5th Cir.)

The third specification presents primarily a question of fact as to the character of the services rendered, which prevents a disposition of the point raised as a matter of law.

The first specification (Pet. Br. p. 5), relates to failure of the referee to segregate the allowance between expenses and services, and to show specifically what was allowed for each service rendered. No request for such a segregation was made of

the referee at the time the allowance was fixed. (Record, p. 7, par. IV). There is nothing in the Bankruptcy Act, rules or orders, requiring such segregation, and failure to make it is no ground for reversal.

In re Smith, 203 Fed. 369, (C. C. A. 6th Cir.)

If the allowance was not excessive, which is a matter that cannot be determined on this proceeding, no harm or prejudice resulted from failure to segregate or apportion it.

On page thirteen of petitioner's brief, the point is raised that there was no sworn statement filed regarding this claim. The trustee reported upon the services rendered by MacDonald, and the request for compensation was submitted by him in his report, which was the basis for calling the creditors' meeting at which the allowance was made. His report was under oath, and this alone would satisfy the requirements of Section 62 of the Bankruptcy Act. Moreover, as the referee specifically points out in his certificate on review, no objection was taken by petitioner at the time the allowance was made, on the ground of failure to file a sworn statement. (Record, p. 19; also Record p. 7, par. IV.) No error is assigned in this court on this ground, either in the petition (Record p. 11, par. XI) or in the specifications in the brief.

This disposes of all the specifications except the fourth and sixth, and we doubt if they submit

any concrete question of law unmixed with disputed questions of fact. If so, the proposition for consideration may be stated thus: Does the fact that MacDonald was a stockholder and officer of the bankrupt corporation preclude the allowance to him of reasonable compensation for services rendered the trustee and the estate in connection with the prosecution by the trustee of a claim against the Emergency Fleet Corporation involving more than a year of Mr. MacDonald's time, a large part of which was spent away from his home (Record, p. 10), from which claim approximately $327,000 of value was realized, and also in connection with assisting the trustee in his defense against the liquidation proceedings brought upon the claim of the Australian Government against the bankrupt, originally filed for a sum in excess of a million dollars, and which has since been entirely off-set by allowances and counter-claims for extras, these proceedings requiring a vast amount of technical advice and information from Mr. MacDonald and likewise occupying several months of his time.

Petitioner claims that the trustee was entitled to require these services of Mr. MacDonald without compensation, because he was an officer of the bankrupt. To sustain this position, it attempts to reconstruct the Bankruptcy Act so to read as to make the term "bankrupt" cover the officers and stockholders of the bankrupt corporation, and to extend the duties required of a bankrupt by the

Act to the rendition of services such as Mr. MacDonald has performed.

Section 1-a (4) of the Bankruptcy Act, it is said, extends the word "bankrupt" to include a "person," and Section 1-a (19) provides that "person" shall include "officers." Therefore, it is argued, wherever the Bankruptcy Act refers to a bankrupt, the reference extends to its officers, if it is a corporation.

However, Section 1-a (18), immediately preceding, provides that the word, "officer," as used in the Act, means an official under the Act, such as a receiver, trustee, or the like. It does not refer to officers of a bankrupt corporation at all. Not only that, but in its reasoning, petitioner wholly ignores the provision of Section 1-a (4) that to come within the term, "bankrupt," the "person" must be one "against whom an involuntary petition or an application to set aside a composition, or to revoke a discharge, has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt."

It is apparent, therefore, that Mr. MacDonald is not an "officer," and so not a "person" referred to by the act, and that in any event, he cannot be included within the term, "bankrupt," because the conditions attached to that term do not apply to him. Although an officer of the bankrupt corporation, Mr. MacDonald cannot, by any finesse of words, be constituted the bankrupt itself, and the

provisions relating to the bankrupt as such are wholly inapplicable to him.

He was, of course, subject to examination under Section 21-a, but the extent of his duty under that section was to attend and give testimony regarding the assets and liabilities of the bankrupt. But procedure under this section would have been wholly inadequate for the prosecution of the trustee's claim against the Emergency Fleet Corporation, and the resistance of the claim of the Australian Government in the bankruptcy court, and in the proceedings before the special master and board of arbitrators. (Record pp. 18 and 19.)

These proceedings required months of preparation and consideration of the facts involved relating to the contracts under way with the Fleet Corporation and the Australian Government, and involving technical shipbuilding skill and knowledge which the trustee had to secure from an expert source. Mr. MacDonald's assistance to the trustee in these matters has occupied a large portion of the time since the adjudication, and has certainly far exceeded the requirements of any service that could be exacted from him as a duty imposed by law without compensation, even were he the bankrupt himself.

These were matters that could not be handled to the advantage of the estate under Section 21-a. The services rendered in this case were of an extraordinary and special character. Without their voluntary rendition in a helpful spirit of co-operation, the trustee would have been able to make little headway

in collecting from the Fleet Corporation, as well as in resisting the claim of the Australian Government and passing upon many other claims involved in the bankruptcy.

The suggestion in petitioner's brief (p. 8) that it was necessary for the trustee to bribe the managing agent to disclose the facts relating to the assets of the bankrupt, is not only wrong but unfair and unjust. Had Mr. MacDonald been acting in this spirit he would undoubtedly have insisted on a contract with the trustee for a percentage of the profits or results secured before he would have rendered any services. He did not endeavor to hold up the trustee or the estate in any such fashion, but rendered his services at the trustee's request and then, on their completion, left the matter to the court and creditors to allow him what they should decide was fair for what he had done. The petitioner was quite willing to have Mr. MacDonald render all possible service in collecting from the Fleet Corporation, because the funds so received would be for its benefit if it succeeded in establishing its own claim. It was present at the meetings when allowances were made to him on account of such services, and it fully understood that Mr. MacDonald was expecting compensation from the estate and the trustee for such services. It took no steps to prevent or review the allowances made to him specifically on account of services, and raised a question only after he had completed such services and the estate had

been enriched by the collection of approximately $327,000. That, in itself should constitute a conclusive bar to the objection petitioner now urges.

But petitioner now says that it permitted these allowances to pass without objection because it considered them applicable to Mr. MacDonald's expenses and witness fees. Passing over the facts as certified to by the referee, and the language of the orders of allowance, which seem to be conclusive of the basis on which Mr. MacDonald was acting, we call attention particularly to the specific allowance of $1500 on account of services, dated June 1st, 1921. (Record on appeal, p. 8). Upon petitioner's explanation that it acquiesced in this as an allowance for witness fees, in spite of the fact that there is no record of his having spent a single day in court, this one allowance would be fees for 500 days services, which was a longer time than the company had been in bankruptcy up to the date it was made. It is impossible to reconcile these allowances with any theory other than that Mr. MacDonald was to receive reasonable compensation for his services.

No cases have been cited by petitioner holding that as an officer of the bankrupt corporation, Mr. MacDonald was under any duty to furnish or render services of the extent, character and magnitude that he has furnished the trustee in this case, or was subject to any duty other than that of submitting to examination under Section 21-a of the Act. Reference is made to a few cases bearing

upon allowance of fees to the bankrupt for attending as a witness, and the allowance of fees for attorneys for the trustee, but these are matters specifically covered by the provisions of the Act, and have no application to the point under discussion as to the obligation of an officer of a bankrupt corporation to render extraordinary services without compensation.

Even if it be conceded that Mr. MacDonald was subject to the provisions imposing duties on the bankrupt as if he was the bankrupt himself, still he would be entitled to compensation for these services. The case of

In re Lane Lbr. Co., 206 Fed. 780,

affirmed by this court under the title of

Whitla & Nelson v. Boyd, 213 Fed. 587,

holds that attorneys for the bankrupt, who voluntarily, or at the bankrupt's request, join with the trustee in resisting claims, are not entitled to compensation from the estate therefor, because the bankrupt is under no legal obligation to perform such duties, that burden being upon the trustee and the creditors.

> "The extent of the bankrupt's obligation was to furnish to the receiver such material information as was in his possession." 206 Fed. 783.

Therefore, if Mr. MacDonald be treated on the same basis as the bankrupt, he was, nevertheless, furnishing information and rendering services at

the request of the trustee, which the bankrupt was under no obligation to furnish.

In re Barrow, 98 Fed. 582 (D. C. Va.),

the bankrupt was held entitled to reasonable compensation for services performed by him in the care and conservation, after date of bankruptcy, of property found to belong to the estate, although the bankrupt had claimed and cared for it as his own.

It will be assumed that the referee and the lower court, in fixing the allowance, took into due account and made allowance for the furnishing of information insofar as it was Mr. MacDonald's statutory duty to do so, and that the allowance made represents what they considered reasonable for the extraordinary services performed by him.

> "We are of the opinion that, within the limitations of these provisions, the allowance of necessary expenses in bankruptcy proceedings is within the power and control of the United States District Court, both as to the occasion therefor and the amount thereof."
>
> *United States v. Ward*, 257 Fed. 372 at p. 377 (C. C. A. 8th Cir.).

The amount allowed is considerable, but the services rendered were extraordinary in character, and productive of results of large magnitude, and the question of the reasonableness of the allowance is a question of fact not before the court on this review. The only question is whether the bankruptcy court could compel him to go to the extent of ren-

dering the services which he has performed under the act without compensation? If not, the petition should be denied.

Respectfully submitted,

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